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In the Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 46, 47 and 48

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

J. C. PENNEY COMPANY, a Delaware Corporation. (No. 46)

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

F. W. WOOLWORTH COMPANY, a New York Corporation. (No. 47)

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING COMPANY, a Delaware Corporation. (No. 48)

BRIEF OF PETITIONERS

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Mayer Printing Company—Madison, Wis.

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BRIEF OF PETITIONERS

The petitioners are the same in the above entitled cases and this brief is submitted on their behalf as a joint brief for all three cases.

Although the detailed facts are different in each case by virtue of there being separate respondents and the conduct by each of its respective individual business and affairs, the same ultimate factual situation exists in all of them. The differences in detailed facts are not material

here. The Supreme Court of Wisconsin heard and decided the cases at the same time and upon the same grounds, its decision in the *J. C. Penney Company* case, number 46 here, expressly controlling the judgment entered in each of the cases. The questions of law here presented are likewise identical.

The facts relating to each case will be hereinafter separately stated. In all other respects the contents hereof, except as otherwise specifically stated, apply equally to all three cases.

I.

THE OPINIONS OF THE COURT BELOW.

The majority and dissenting opinions of the Supreme Court of Wisconsin, filed January 16, 1940, in the three cases are reported respectively in Vol. 233 Wis. (Advance Sheets, No. 3) pp. 286, 305 and 306, and in 289 N. W. 676, 685 and 686 (No. 46, R. 77; No. 47, R. 78; No. 48, R. 95).

II.

JURISDICTION.

1. The jurisdiction of this Court is invoked under the provisions of Section 237b of the Federal Judicial Code (28 U. S. C. A. 344 (b)), and petitioners rely upon Paragraph 5 (a) of Rule 38 of the Rules of this Court.

2. The writs of certiorari in these cases were issued to review the separate judgments of the Supreme Court of Wisconsin in the three cases. The judgment of the Supreme Court of Wisconsin was entered in each case

on January 16, 1940 (No. 46, R. 76; No. 47, R. 77; No. 48, R. 94).

3. Review is here sought by the writs of certiorari in these cases of three separate judgments entered by the Supreme Court of the State of Wisconsin upon appeals to it in three separate proceedings in the state courts of Wisconsin respecting the validity of taxes assessed by the State of Wisconsin against the respective respondents separately. The respondent in each case contends and in its pleading throughout the proceedings has averred that insofar as Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended by Chapter 552, Laws of Wisconsin, 1935, imposes a tax upon the respondent under the facts set out in the record, said Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, imposes a tax beyond the taxing jurisdiction of the State of Wisconsin, and that, therefore, the imposition of the tax against the respondent by the assessment involved, which was made pursuant to the provisions of said Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, constitutes a deprivation of the respondent's property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. Separate judgments in the state courts of Wisconsin affirming the taxes assessed by the State of Wisconsin, pursuant to said Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, against the respective respondents were reversed on separate appeals by the Supreme Court of Wisconsin on the constitutional objections thus asserted by the respondents. It is these

judgments of the Supreme Court of Wisconsin that are here under review.

4. Reference is also made to the separate petitions for and briefs in support of the granting of the writs of certiorari in these cases, for a more comprehensive jurisdictional statement.

5. The briefs in opposition to the granting of the writs in two of these cases urged that there is no indication in the decision of the Supreme Court of Wisconsin that it was rested on a federal question. Such position is wholly untenable in view of the fact that the Supreme Court of Wisconsin specifically rested its decision upon the federal question. Attention is directed to the statement in the opinion (No. 46, R. 77, 86), reported *J. C. Penny Company v. Tax Commission*, (1940) 233 Wis. (adv. sheets) 286, 297, 289 N. W. 677, 682, as follows:

> "* * * While there is much to be said for the proposition that a foreign corporation admitted to do business in Wisconsin should be subject to the same burdens and liabilities as is a similar Wisconsin corporation, *we must in the determination of this question conform to the law as laid down by the Supreme Court of the United States.* * * *
>
> "We are strongly urged to affirm the judgment in this case because the state treasury is dependent upon the maintenance of the right of the state to tax dividends of foreign corporations to the extent that such dividends are derived from earnings within the state. The matter of financial exigencies of the state, however, *afford no justification for the ignoring of a rule of law laid down by the United States Supreme Court. The state must find its revenues within the field within which its taxing power may be exerted as prescribed by the constitution and laws of the United States.*" (Emphasis supplied)

III.

STATEMENT OF THE CASE.

The controversy in these cases is as to the validity of taxes assessed by the State of Wisconsin against the respective respondent foreign corporations, doing business in the State of Wisconsin pursuant to the laws thereof. The taxes involved were assessed pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, which imposes a tax upon corporate dividends paid out of income derived from property located or business transacted in the State of Wisconsin. A copy of said Section 3 of Chapter 505, Laws of Wisconsin, 1935 (effective upon its publication on September 26, 1935) and as amended by Chapter 552, Laws of Wisconsin, 1935 (effective upon its publication on October 8, 1935) is printed as an Appendix to this brief.

Said taxing statute is a special act and imposes a tax on "all corporations (foreign and local)" "equal to two and one-half per centum of the amount" of dividends declared and paid out of income derived from property located and business transacted in the State of Wisconsin. It provides that such tax shall be deducted and withheld by the corporation from the dividends paid to both residents and nonresidents of Wisconsin and that the corporation is made liable for the tax and the payment thereof.

In Subsection (4) thereof it is specifically provided that as to "corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state

of Wisconsin" and that the amount of income of such a corporation attributable to the State of Wisconsin shall be computed in the same manner as is provided in Chapter 71 of the Wisconsin Statutes (the general income tax law) for the determination of the income of such type of corporation allocable as Wisconsin income.

The detailed facts in each case are not in dispute and are contained in separate records certified to this Court. No issue as to the facts was raised or presented in the cases in the state courts of Wisconsin and none now exists or is here presented. Likewise, no question has been raised, and none exists, as to the correctness of the procedure in the assessment of the taxes involved or in the review of the assessments in the state court proceedings. Consequently, no procedural matters are involved herein. The only controversy at issue involved in the proceedings in the state courts and presented to and decided by the Supreme Court of Wisconsin in rendering the judgments under review is whether the Fourteenth Amendment to the Constitution of the United States precludes the State of Wisconsin from imposing the tax, as provided in Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, upon the respective respondent foreign corporations under the facts set out in the records. This is solely a question of law and purely a federal question. The judgments of the Supreme Court of Wisconsin under review are based solely on its decision of that question. The petitioners here contend that its decision upon said federal question is erroneous and should be reversed.

Separate assessment of the taxes involved in each case was made against each respondent (No. 46, R. 43, 49; No. 47, R. 50-52; No. 48, R. 46). Each respondent

duly filed its objections to said assessment and duly applied for a hearing thereon in the manner and as provided by the Wisconsin statutes (No. 46, R. 51; No. 47, R. 53-54; No. 48, R. 48). Each respondent herein made the claim that Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as applied to it under the existing facts purports to impose a tax beyond the taxing jurisdiction of the State of Wisconsin and, therefore, is invalid as violative of the due process provision of the Fourteenth Amendment to the Constitution of the United States. The matters were heard separately by the Wisconsin Tax Commission and it entered a separate decision and order sustaining the assessment in each case (No. 46, R. 19; No. 47, R. 22; No. 48, R. 28). Separate appeals therefrom, in accordance with and as provided by the Wisconsin statutes, were taken to the Circuit Court for Dane County, Wisconsin, by each of the respondents, and in the pleadings upon such statutory appeals each respondent renewed its objection to the tax upon said constitutional grounds.

The Circuit Court for Dane County, Wisconsin, upheld the validity of the tax in each case upon the authority of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis, 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, in which case the Supreme Court of the State of Wisconsin in a declaratory judgment in 1936 had expressly sustained the validity of said tax law as applied to both foreign and domestic corporations over the objection that it contravened the due process of law provisions of the Fourteenth Amendment to the Constitution of the United States (No. 46, R. 67; No. 47, R. 67; No. 48, R. 83), and entered separate judgments on June

10, 1939 in each case sustaining the assessment there involved (No. 46, R. 69; No. 47, R. 68; No. 48, R. 85).

Upon separate appeals from said Circuit Court of Dane County, Wisconsin, by the respective respondents the Supreme Court of Wisconsin sustained the contention of the respondents and held that Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, was invalid insofar as it purported to impose a tax upon the devolution of dividends of the respondent corporations to their respective stockholders. The Supreme Court of the State of Wisconsin expressly overruled its decision in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, and did so expressly upon the authority of *Connecticut General Life Ins. Co. v. Johnson,* (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 (No. 46, R. 77; No. 47, R. 78; No. 48, R. 95). It is these decisions and judgments of the Supreme Court of the State of Wisconsin that are here under review.

IV.

SUMMARY OF FACTS.

As before stated, the detailed facts in each case are not in dispute and are contained in the separate records certified to this Court and printed separately for each case. Following are separate summaries of such facts in each case as are material to the questions here involved. The page references to the record contained in each summary are to the page of the printed record in the particular case to which the summary is applicable.

1. *No. 46, J. C. Penney Company Case*

The J. C. Penney Company is a Delaware corporation, having its statutory office at Wilmington, Delaware (R. 26). It is engaged in the business of operating a nation wide chain of retail department stores, approximately 1500 in number. It is licensed to do business in the State of Wisconsin but has no executive office of any kind located within the State (R. 27). During the year 1934 it operated 47 stores in Wisconsin. In 1935 and 1936 it operated 48 stores in Wisconsin (R. 28). During the year 1934, the corporation had a total net income computed on the Wisconsin tax basis of $16,022,607, and in 1935, a total net income of $15,223,478. Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes (1935)) $562,331.00 of the 1934 income was allocable to Wisconsin business and $587,000.00 of the 1935 income was allocable to Wisconsin business (R. 46).

On December 31, 1935, the J. C. Penney Company declared a dividend of $2.25 per share, making total dividend payments of $5,555,214.00 (R. 45).

In 1936, it declared and paid the following dividends (R. 45):

Date Paid	Amount per share	Total Amount Paid to Stockholders
3/31/36	$ .75	$ 1,851,738.00
6/30/36	.75	1,851,738.00
9/30/36	1.00	2,468,984.00
12/15/36	4.75	11,727,674.00

The J. C. Penney Company operates its business in the following manner: the total proceeds from sales of

goods in all its stores, including Wisconsin stores, are deposited in local banks. From such deposits payments are made by the local store managers for payrolls, rents, advertising and other local expenses. The remainder not needed for such expenses is ultimately transferred to the treasurer's office in New York City and deposited in New York banks to the credit of the corporation. No separate account is kept of the funds from the various States and moneys after leaving the local banks completely lose their identity with respect to being derived from a particular source. From the funds deposited in New York, salaries, general overhead expenses in New York and other offices, taxes and dividends are paid. Checks are also drawn thereon in payment for all merchandise purchased and shipped to the various stores (R. 29). All of the stockbooks, minute books and secretary's records of the corporation are kept in the State of New York, except that a duplicate stock ledger is kept in Delaware as required by that State. All transfers of shares of stock are made by the New York transfer agent of the corporation; all directors and stockholders' meetings are held in the State of New York and all dividends are declared at such meetings (R. 30). The actual payment of dividends is effected by checks drawn upon the accounts of the corporation in New York, payable to the stockholders of record upon each dividend record date. Such checks are mailed to the postoffice address of each stockholder as the same appears in the record. No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received

their mail in Wisconsin (R. 32). As of the date of payment of the December 31, 1935 dividend, 391 stockholders were residents of the State of Wisconsin as against a total of 12,385 stockholders. With respect to the dividend paid on December 15, 1936, there were 405 Wisconsin stockholders as against a total of 13,281 stockholders (R. 51).

Pursuant to a notice of an additional assessment dated July 16, 1937, in accordance with the procedural provisions of the Wisconsin statutes, the Wisconsin Tax Commission assessed a tax against the said J. C. Penney Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of $23,586.79 (R. 43 and 49). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 51). Thereupon the matter was heard by the Wisconsin Tax Commission and on July 21, 1938 it entered a decision and order sustaining the assessment of said taxes in the amount of $23,586.79 (R. 19).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation and pursuant to the provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939 judgment was entered therein confirming the same (R. 69). Upon appeal therefrom by the J. C. Penney Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940 rendered its

decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said J. C. Penney Company, under the facts as stated, were invalid as depriving the said J. C. Penney Company, a corporation, of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States (R. 77). It is this decision and judgment of the Supreme Court of the State of Wisconsin that is under review in this case.

2. *No. 47, F. W. Woolworth Company Case*

The F. W. Woolworth Company is a New York corporation, having its statutory office at Watertown, New York, and its principal business office in the Woolworth Building, New York City, New York. During the years involved it was engaged in the business of operating a chain of retail mercantile stores in 29 States, the District of Columbia and Cuba, and owns all or a part of the stock in other corporations engaged in the same business in the other 19 States, Canada, Great Britain and Germany (R. 44). It is licensed to do business in the State of Wisconsin but has no executive office of any kind located within the State (R. 4). During the years 1934, 1935 and 1936 it operated about 55 stores in Wisconsin (R. 39). Computed on the Wisconsin tax basis, the corporation had a total net income during the year 1934 of $27,808,579.19, in 1935 a total net income of $24,606,991.08, and in 1936 a total net income of $25,102,593.64 (R. 4). Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes 1935) $555,538.44

of the 1934 net income was allocable to Wisconsin business, $579,547.66 of the 1935 net income was allocable to Wisconsin business, and $576,522.38 of the 1936 net income was allocable to Wisconsin business (R. 4).

On each of the following dates, to-wit: December 2, 1935, March 2, 1936, June 1, 1936, September 1, 1936, December 1, 1936, and March 1, 1937 the F. W. Woolworth Company declared a dividend on all its outstanding stock, and on each of said dates paid a total dividend of $5,850,000. Of each of said dividends $5,822,167.80 was paid on shares outstanding in the hands of stockholders, and the balance of $27,832.20 of each dividend was paid upon shares outstanding but held in the Company's treasury (R. 5). Each of these dividends was declared by the board of directors at meetings held in New York City, New York (R. 34).

The F. W. Woolworth Company operates its business in the following manner: from the proceeds from sales of goods in each store, including Wisconsin stores, the local manager pays the local expenses such as payrolls and small supplies. He deposits the balance above these requirements in a local bank. Periodically the Minneapolis district office draws on this bank account and when so drawn the moneys are combined at the Minneapolis office with moneys similarily drawn from banks from other States in the Minneapolis district. No attempt is made to keep the money separate from the different States. The Minneapolis office uses the moneys so received to pay merchandise bills, alteration, and other expenses (R.35). A separate accounting for each store is kept at the Minneapolis office (R. 41). From time to time the district office accumulates funds above these re-

quirements which are transmitted to the main office in New York City and deposited in New York banks to the credit of the corporation (R. 35). From the funds deposited in New York, salaries, general overhead expenses in New York and other offices, taxes and dividends are paid (R. 36). All of the stockbooks, minute books and secretary's records of the corporation are kept in the State of New York. All transfers of shares of stock are made by the New York transfer agent of the corporation; all directors and stockholders' meetings are held in the State of New York (R. 36). All dividends are declared at such meetings (R. 34). The actual payment of dividends is effected by a check drawn upon the bank account of the corporation in New York, payable to its transfer agent, City Bank Farmers Trust Co. of New York City for the total amount of each dividend declared. The transfer agent then prepares checks payable to each stockholder of record which it mails in New York City to the postoffice address of each stockholder as the same appears in the record (R. 34). No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received their mail in Wisconsin (R. 34). As of the said dividend dates there were in excess of 50,000 stockholders of the company owning 9,703,613 shares of which not more than 470 were residents of the State of Wisconsin owning not more than 14,597 shares (R. 7).

Pursuant to a notice of an additional assessment dated July 16, 1937, in accordance with the procedural provisions of the Wisconsin statutes, the Wisconsin Tax

Commission assessed a tax against the said F. W. Woolworth Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of $20,058.33 (R. 50-52). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 53, 54). Thereupon the matter was heard by the Wisconsin Tax Commission and on December 19, 1938, it entered a decision and order sustaining the assessment of said taxes, as adjusted in the amount of $20,058.33, exclusive of interest and penalties (R. 26).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation pursuant to the provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939, judgment was entered therein confirming the same (R. 68). Upon appeal therefrom by the F. W. Woolworth Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940, rendered its decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said F. W. Woolworth Company, under the facts as stated, were invalid as depriving the said F. W. Woolworth Company, a corporation, of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, based upon the opinion filed and the decision of the

Supreme Court of Wisconsin in the case of *J. C. Penney Company, a foreign corporation, v. Wisconsin Tax Commission,* on the same date (R. 78). It is this decision and judgment of the Supreme Court of the State of Wisconsin that is here under review.

3. *No. 48, Minnesota Mining and Manufacturing Company Case*

The Minnesota Mining and Manufacturing Company is a Delaware corporation, having its statutory office at Wilmington, Delaware, and its principal business office in St. Paul, Minnesota (R. 5). During the years involved it was engaged in the manufacturing business, operated factories at Detroit, Michigan, Copley, Ohio, St. Paul, Minnesota and also a factory at Wausau, Wisconsin, manufacturing roofing granules (R. 64). It is qualified to do business in the State of Wisconsin under the laws thereof but has no executive office of any kind located within the State (R. 5). Computed on the Wisconsin tax basis, the corporaton had a total net income during the year 1935 of $1,764,460.30. Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes 1935) $261,157.62 of the 1935 net income was allocable to Wisconsin business (R. 48).

The Minnesota Mining and Manufacturing Company paid dividends as follows (R. 48):

No. 1 January 2, 1936	$ 215,909.83
No. 2 April 1, 1936	216,380.97
No. 3 July 1, 1936	288,278.00
No. 4 October 1, 1936	336,441.00
No. 5 December 22, 1936	624,819.00
Total	$1,681,828.80

The dividends above shown as paid in April, July, October and December included dividends paid on treasury stock to the aggregate amount of $1,866.25, but the amount shown above for the dividend paid in January does not include dividends paid on treasury stock on that date in the amount of $371.25 (R. 67). All of said dividends were declared at meetings of the Board of Directors held in St. Paul, Minnesota (R. 43).

The products of the Wausau plant are shipped to Chicago and points west, and the sales thereof are made through the Company's branch office in Chicago, Illinois. Pricing and billing the customer is done at the St. Paul, Minnesota office. The customer remits directly to the St. Paul office and the proceeds are deposited in banks in St. Paul, Minnesota (R. 64), where they are co-mingled with funds from other factories and income from other sources. The funds in said bank are used to pay expenses, royalties and dividends (R. 65). Employees of the Wausau, Wisconsin plant are paid as follows: After the payroll is prepared and sent to the main office at St. Paul, checks are there drawn on a Wausau bank and sent to the Wausau plant manager for distribution. On the same day a deposit in the amount of the total payroll is sent by the main office to the Wausau bank to meet the payroll checks (R. 65). The method of payment of each of said dividends was that the Company drew one check on its bank account in St. Paul, Minnesota for the full amount of the dividend, including the amount paid on the treasury stock, payable to its transfer agent in St. Paul, Minnesota, which in turn paid the dividends therefrom to the individual stockholders and returned to the corporation the dividends declared and paid on the treasury

stock (R. 68). No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received their mail in Wisconsin (R. 8). As of January 1, 1936 there were 42 stockholders of the company owning 3,006 shares, who were residents of the State of Wisconsin, and on January 1, 1938 there were 44 stockholders owning 4,944 shares who were residents of the State of Wisconsin. The Company had 961,260 shares of common stock outstanding, which were owned in practically every State in the Union (R. 64).

Pursuant to a notice of an additional assessment dated August 13, 1937, in accordance with the procedural provisions of the Wisconsin Statutes, the Wisconsin Tax Commission assessed a tax against the said Minnesota Mining and Manufacturing Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of $5,471.06 (R. 46). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 48). Thereupon the matter was heard by the Wisconsin Tax Commission and on December 19, 1938 it entered a decision and order sustaining the assessment of said taxes, as adjusted in the amount of $5,471.06, exclusive of interest and penalties (R. 74).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation pursuant to the

provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939 judgment was entered therein confirming the same (R. 85). Upon appeal therefrom by the Minnesota Mining and Manufacturing Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940 rendered its decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said Minnesota Mining and Manufacturing Company, under the facts as stated, were invalid as depriving the said Minnesota Mining and Manufacturing Company, a corporation, of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, based upon the opinion filed and the decision of the Supreme Court of Wisconsin in the case of *J. C. Penney Company, a foreign corporation, v. Wisconsin Tax Commission,* on the same date (R. 95). It is this decision and judgment of the Supreme Court of the State of Wisconsin that is here under review.

V.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Wisconsin erred in holding in each case that Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended by Chapter 552, Laws of Wisconsin, 1935) as applied to the respective respondents, under the existing facts, imposed a tax beyond the taxing

jurisdiction of the State of Wisconsin and therefore is invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Wisconsin erroneously held in each case that the assessment of the taxes involved, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended by Chapter 552, Laws of Wisconsin, 1935) against the respective respondents, under the existing facts, constitutes a deprivation of property of the respondents without due process of law because beyond the taxing power of the State of Wisconsin and therefore is invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

VI.

ARGUMENT

POINT A. In *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, the Supreme Court of Wisconsin construed Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as imposing a tax upon the devolution or transfer of dividends derived from the income of corporations arising out of corporate business transacted in this State or corporate property located in this State. The constitutionality of the tax was upheld as applied to domestic and foreign corporations against the objection that it contravened the Fourteenth Amendment to the Constitution of the United States in that it attempted to impose a tax beyond the taxing jurisdiction of the State.

POINT B. The Supreme Court of Wisconsin in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 correctly applied the Fourteenth Amendment to the United States Constitution, as that amendment is construed by this Court, in determining the constitutionality of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended.

POINT C. The Wisconsin Supreme Court in the instant cases, while it adhered to the construction of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, laid down in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, erred in holding that the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson,* (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, required that the tax be invalidated as beyond the taxing jurisdiction of the State of Wisconsin under the Fourteenth Amendment to the United States Constitution.

POINT D. The declaration and payment of dividends outside of the State of Wisconsin by a foreign corporation does not itself constitute an event taxable by Wisconsin and the court below properly so held. Where the income distributed is derived from Wisconsin earnings, however, and thus forms the subject matter of the transfer, the State of Wisconsin acquires jurisdiction to tax the transfer.

Point A.

IN STATE EX REL. FROEDTERT G. & M. CO., INC. v. TAX COMMISSION, (1936) 221 WIS. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, THE SUPREME COURT OF WISCONSIN CONSTRUED SECTION 3 OF CHAPTER 505, LAWS OF WISCONSIN, 1935, AS AMENDED, AS IMPOSING A TAX UPON THE DEVOLUTION OR TRANSFER OF DIVIDENDS DERIVED FROM THE INCOME OF CORPORATIONS ARISING OUT OF CORPORATE BUSINESS TRANSACTED IN THIS STATE OR CORPORATE PROPERTY LOCATED IN THIS STATE. THE CONSTITUTIONALITY OF THE TAX WAS UPHELD AS APPLIED TO DOMESTIC AND FOREIGN CORPORATIONS AGAINST THE OBJECTION THAT IT CONTRAVENED THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT ATTEMPTED TO IMPOSE A TAX BEYOND THE TAXING JURISDICTION OF THE STATE.

The provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), the tax law involved in the present controversies, so far as here material, reads as follows:

> "Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and wthheld from such dividends payable

to residents and nonresidents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission."

(A copy of the entire law is printed as an Appendix to this brief.)

Shortly following the enactment thereof an original action was instituted in the Supreme Court of the State of Wisconsin by the Froedtert Grain & Malting Company, Inc. for the purpose of obtaining a declaratory judgment as to the constitutionality of the law. The decision of the Wisconsin Supreme Court in said proceeding is reported in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. The court upheld the law in its entirety as against the constitutional objections urged, including the objection that the tax imposed thereby was without the taxing jurisdiction of the State and was, therefore, prohibited by the Fourteenth Amendment to the Constitution of the United States.

A motion for rehearing was made and in connection therewith the Court was urged to determine the constitutionality of the law as applied to foreign corporations. The Froedtert Grain & Malting Company was a Wisconsin corporation and there was nothing specifically said in the court's first opinion to indicate whether it considered the law constitutional as applied to foreign corporations. In its opinion on rehearing it was specifically held by the

Court that the law, as applied to foreign corporations, was valid and that it did not impose a tax without the taxing jurisdiction of the State of Wisconsin.

The basis of the holding in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, was as follows:

(1) The law imposes a tax upon the devolution or transfer from a corporation to its stockholders of income earned in the State of Wisconsin;

(2) The law rests upon the same constitutional basis as laws taxing the devolution of property by death and other comparable laws taxing transfers;

(3) Corporate earnings in the State of Wisconsin are taxable in Wisconsin, and the law in question merely serves to impose such a tax.

We do not expect any disagreement with counsel for respondents as to what the case in question held, but to avoid any question as to the analysis we have made, we quote the following passages from the court's opinion (*State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478):

> "* * * the word 'privilege,' as used in the statutes taxing privileges, is used as synonymous with right. * * * This court has so construed the word in the inheritance tax cases. * * * The tax is a privilege tax, or an excise tax, one form of which is a tax imposed on the transfer of property. The federal government in its stamp taxes, imposes a tax on the right to transfer property by deed; it formerly

imposed a tax on the right to transfer funds in banks by check; it imposes taxes on the transfer of property by inheritance or will. These taxes are best characterized as a tax on the transaction involved. The power of the state to impose excise taxes is under our system of dual sovereignty as broad as the power of the federal government. * * *." (Pages 230-231)

"However the legislature may have regarded the tax, we have no difficulty in construing the statute as imposing an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders." (Page 233)

"* * * But the tax is an excise tax, a tax on the transaction involved. It is an excise tax imposed on the devolution of income, derived from transaction of business within the state, which is confessedly a proper subject of taxation. It is as much subject to an excise tax as is an inheritance tax, and the supreme court of the United States recognizes such taxes as not violating the United States constitution. * * * It is to be noted that the tax imposed on the salaries of nonresidents involved in the *Travis Case, supra,* [*Travis v. Yale & Towne Mfg. Co.*, (1920) 252 U. S. 60, 64 L. Ed. 460, 40 S. Ct. 228] was held not to impose a personal liability upon the nonresident employee. The tax, except as to a feature not involved herein, was upheld as a sequestration at their source of payment of earnings properly taxable which is precisely and only what the instant statute does." (Page 235)

"From some things in the briefs on the motion for rehearing we fear that we failed to make our position entirely clear in the original opinion. Our position is that the tax is an excise tax on the transfer of earnings resulting from property located or business transacted within this state, and stands on the same

basis of constitutionality that a state inheritance tax stands; that the tax of the state of New York on stock transfers, upheld in *Hatch v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188, stood; that the state tax in New York on the transfer of property by deed upheld in *Keeney v. New York*, 222 U. S. 525, 32 Sup. Ct. 105, stood; and that the tax on salaries of nonresidents earned within the state, upheld in *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 40 Sup. Ct. 228, stood. Earnings from property or transactions within the state are as much subject to a transfer tax as property within the state passing by inheritance or deed or other form of transfer, or salaries earned within the state. * * *." (Page 240)

"* * * The basis of the instant tax is the fact that the dividends result from earnings from property situated or business transacted within this state. Such earnings are a proper subject of taxation, and therefore a proper basis for an excise tax on the transfer of the dividends resulting therefrom. * * * (Pages 241-242)

"* * * We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived, and the validity of the latter form of taxation is established. The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the state. They are as readily collectible as is an income tax against a foreign corporation. Liability for payment of the tax is imposed upon the corporation. If such liability may be imposed there is no difficulty about collecting it, and there is no more difficulty about imposing the liability than existed in the *Travis Case, supra*, about imposing upon the employer liability for the income tax on salaries of nonresidents earned within the state." (Pages 245-246)

Point B.

THE SUPREME COURT OF WISCONSIN IN THE CASE OF STATE EX REL. FROEDTERT G. & M. CO., INC. v. TAX COMMISSION, (1936) 221 WIS. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 CORRECTLY APPLIED THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS THAT AMENDMENT IS CONSTRUED BY THIS COURT, IN DETERMINING THE CONSTITUTIONALITY OF SECTION 3 OF CHAPTER 505, LAWS OF WISCONSIN, 1935, AS AMENDED.

Since the Wisconsin Supreme Court in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 sustained the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, upon the theory that its constitutionality was determined by the same principles as apply to a determination of the validity of inheritance or estate taxes, it becomes necessary to determine whether, on the basis of such an analogy, the tax can be sustained under the Fourteenth Amendment to the United States Constitution as interpreted by the decisions of this Court.

Had the Wisconsin Court in the present cases altered its position as to the construction of the law there would, of course, be no occasion for examining its constitutionality in the light of the analysis made in a prior decision. We shall show, however, in the next point to be made in our argument that the construction of the law has not been changed by the Wisconsin Court. Consequently it becomes appropriate to determine the constitutional ques-

tion in the light of the analysis made in the first decision and a logical development of the argument requires that the problem be handled on that basis.

The decisions of this Court establish the following propositions:

(1) "Death duties rest upon the principle that death is the 'generating source' from which the authority to impose such taxes takes its being, and 'it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.' * * *"

Tyler v. United States, (1930) 281 U. S. 497, 502, 74 L. ed. 991, 50 S. Ct. 356;
New York Trust Company, et al. v. Eisner, (1921) 256 U. S. 345, 65 L. ed. 963, 41 S. Ct. 506;
Stebbins v. Riley, (1925) 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424;
Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803;
Knowlton v. Moore, (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

(2) The power to impose transfer, succession or legacy taxes is not dependent for its existence upon the power to regulate the transmission of property by death or upon the granting of a privilege to transmit or to receive property by death.

Stebbins v. Riley, (1925) 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424;
Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803;
Knowlton v. Moore, (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

(3) The power of a state to impose a transfer tax is not dependent upon the event of death in that state. None of the cases decided by the court places emphasis upon the place of that event. Neither does the power of a state to tax a transfer depend upon those acts necessary to effectuate the transfer taking place within the state's territorial jurisdiction and pursuant to its laws.

Graves v. Elliott. (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913;
Bullen v. Wisconsin, (1916) 240 U. S. 625, 60 L. ed. 830, 36 S. Ct. 473;
Cf. Estate of Bullen, (1910) 143 Wis. 512, 128 N. W. 109.

(4) If a state has jurisdiction to impose a tax upon property, it may impose a tax upon the devolution by death of such property.

Graves v. Elliott (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913;
Curry v. McCanless, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900;
Rhode Island Hospital Trust Co. v. Doughton, (1926) 270 U. S. 69, 70 L. ed. 475, 46 S. Ct. 256;
Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803.

(5) A state may tax the income of individuals and corporations derived from business transacted and property located in the state.

Underwood Typewriter Company v. Chamberlain, (1920) 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45;
Travis v. Yale & Towne Mfg. Co., (1920) 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228;

Shaffer v. Carter, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221;
United States Glue Company v. Oak Creek, (1918) 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499.

The application of the analogy drawn by the Wisconsin Supreme Court between the tax here in question and a tax upon transfers by death necessarily results, in view of the foregoing, in establishment of the following propositions:

(a) The tax here in question is, as held by the Wisconsin Court, an excise upon the transfer of corporate earnings, which embraces the right to transmit and the right to receive.

(b) The state may tax the transfer notwithstanding the fact that it does not grant the privilege to make the transfer and may not regulate it.

(c) The fact that dividends may be declared and paid outside the state pursuant to the law of another state does not deprive the state of the power to impose the tax in question.

(d) If jurisdiction to tax the thing transferred results in jurisdiction to tax the transfer, the State of Wisconsin may tax the devolution to corporate stockholders of corporate income earned in this State.

The analogy thus drawn between the tax here involved and transfer taxes upon the devolution of property by death, if the analogy is validly drawn, conclusively establishes the constitutionality of the tax law in question in the face of the jurisdictional objections that have

been raised against the law as it has been applied to the respondent corporations. It remains, therefore, to determine whether the Wisconsin Supreme Court in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 was justified in drawing the analogy. A consideration of this problem resolves itself into a consideration of two somewhat interrelated questions, as follows:

(1) Is the devolution of income from a corporation to its stockholders a proper subject for the imposition of an excise tax?

(2) Do the considerations which have been held to justify the imposition of an excise upon the transfer of property resulting from death justify as well the imposition of an excise upon the transfer of corporate income from a corporation to its stockholders?

We shall discuss these questions in order.

First. The Wisconsin Supreme Court held in *State ex rel. Froedtert G. & M. Co., Inc., v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 that the excise tax imposed by the law in question was a tax upon the exercise of rights, as distinguished from the exercise of privileges. In referring to the power of the State to levy excise taxes, and as authority for the imposition of an excise upon the transfer of corporate income from a corporation to its stockholders, the Court quoted the following passage from *Cooley, Constitutional Limitations* (7th ed.) p. 678:

"* * * 'The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession.' * * *."

State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission, (1936) 221 Wis. 225, 231-232, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478.

This Court has referred to the taxing power in the following language:

"* * * The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. * * *."

Tyler v. United States, (1930) 281 U. S. 497, 503, 74 L. ed. 991, 50 S. Ct. 356.

It has said that:

"* * * In our system of government the States have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises. * * *."

Shaffer v. Carter, (1920) 252 U. S. 37, 50, 64 L. ed. 445, 40 S. Ct. 221.

The Court has also said that:

"* * * Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

State Tax on Foreign-Held Bonds, (1872) 15 Wall. 300, 319.

Again, it has been stated that:

"* * * We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of National interference are well settled. There is no general supervision on the part of the Nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and methods. * * *."

Michigan Central Railroad Company v. Powers, (1906) 201 U. S. 245, 292-293, 50 L. ed. 744, 26 S. Ct. 459.

In a recent case the Court has had occasion to consider the nature of excise taxes and the subjects upon which they may be levied. In conformity with the view of the Wisconsin Court it is held that excises may be imposed upon the exercise of rights, as distinguished from privileges. It is held, moreover, that business is a legitimate subject of the taxing power and that the power to tax business comprehends the power to tax the activities and relations which inhere in the transaction of business.

Chas. C. Steward Mach. Co. v. Davis, (1937) 301 U. S. 548, 580, 581, 81 L. ed. 1279, 57 S. Ct. 883.

Within its territorial jurisdiction a state may select the modes and methods by which it will raise tax monies, subject only to those provisions of the Federal Constitution which restrain unwarranted exercise of the taxing power. No one can fairly argue that an excise upon the devolution of dividends is not an appropriate subject of taxation or that in and of itself the imposition of such an excise violates any provisions of the Federal Constitution. In fact such a transfer measures the fruits of corporate earnings transferred from a corporation to its members. And the transfer is fairly subject to a tax which has for its purpose the taxation of Wisconsin corporate earnings at the point they become subject to the enjoyment of those who conduct a corporate business for the purpose of acquiring and distributing such earnings among themselves.

Second. Taxation has been said by this Court to represent a means or method of defraying the cost of government and it is held to rest upon the obligation of one enjoying the protection of the laws to contribute his just share toward defraying the cost of that protection.

First Bank Stock Corp. v. Minnesota, (1937) 301 U. S. 234, 241, 81 L. ed. 1061, 57 S. Ct. 677.

And so it is that protection afforded by a government in the acquisition, preservation and enjoyment of property or of income or protection afforded during the pursuit of gainful occupations has been held to afford a legitimate basis for the imposition of a tax by the government affording the protection.

Curry v. McCanless, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900;

Shaffer v. Carter, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221;
New York ex rel. Cohn v. Graves, (1937) 300 U. S. 308, 81 L. ed. 666, 57 S. Ct. 466;
Union Transit Co. v. Kentucky, (1905) 199 U. S. 194, 202, 50 L. ed. 150, 26 S. Ct. 36.

As we have heretofore stated, the power to impose a transfer tax upon the devolution of property by death has been held to exist in any case where the taxing power extended to the imposition of a tax upon the property so transferred. Thus, in protecting the acquisition and enjoyment of property and enforcing rights which are of themselves property, a state derives the power to tax the property so protected and it derives as well the power to tax its transfer by death. The protection afforded by a state to property is reasonably related to the transfer of the property at death, since without the protection there would be no property to transfer. The right to transmit, the transmission, and the right to receive as applied to the devolution of property by death would in each case be an empty form were it not for the protection afforded by the state to the subject transferred.

In the case of the transfer of corporate dividends the same basis for taxation exists that exists in the case of transfers of property by death, as we shall proceed to demonstrate.

The right to be a corporation or to do business in that form is a valuable privilege.

"* * * It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. * * *."

Home Ins. Co. v. New York, (1890) 134 U. S. 594, 599-600, 33 L. ed. 1025, 10 S. Ct. 593.

The object of the corporate form of enterprise is to do business in a form thought to be suited to the profitable transaction of business—to acquire earnings—and to distribute such earnings among the members of the corporation. The corporation itself is an artificial entity distinct from its members which exists for the purpose of transacting business and acquiring earnings but it is in the very nature of things incapable of enjoying its earnings. It is of the very essence of a corporate business enterprise that its earnings shall inure to the benefit of its members and that only its members shall enjoy its earnings.

Thus, protection of the law of a state in which a corporation does business is invoked and given for the purpose of making it possible to earn income for distribution to the members of the corporation. The protection so invoked and given cannot, therefore, be dissociated from the distribution of corporate earnings. Corporate income is earned for the purpose of distribution to the corporate members and the state protects the acquisition of corporate income in order that there may be earnings to distribute to the members.

There can be no doubt that the ultimate distribution of the fruits or profits from corporate business to its stockholders is the prime, if not the sole, objective of corporate

enterprise. Thus, a tax upon the transfer of corporate earnings derived from business transacted in the taxing state, is laid upon the benefits arising out of the exercise of rights under and protected by the laws of the taxing state. It taxes such benefits at the time they are realized by the very persons for whom they were earned and by whom, at the time of earning, it was intended they would be realized.

In the last analysis, therefore, as in the case of death duties, the tax involved in the present case may be rested upon the protection afforded by the state in relation to the subject of the transfer. As we have indicated, it is not too much to say that protection of the laws of the state is invoked and given in order to create the subject of the transfer for the purpose of transfer. And the state, since it has jurisdiction to tax the subject of the transfer (*Shaffer v. Carter,* (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; *United States Glue Company v. Oak Creek,* (1918) 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499), at the time of transfer, may tax the transfer.

Thus we conclude that the Wisconsin Supreme Court in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478, was justified in sustaining the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as applied to both foreign and domestic corporations upon the authority of the adjudicated decisions of this Court dealing with the taxation of incomes and inheritances.

Point C.

THE WISCONSIN SUPREME COURT IN THE INSTANT CASE, WHILE IT ADHERED TO THE CONSTRUCTION OF SECTION 3 OF CHAPTER 505, LAWS OF WISCONSIN, 1935, AS AMENDED, LAID DOWN IN THE CASE OF STATE EX REL. FROEDTERT G. & M. CO., INC. v. TAX COMMISSION, (1936) 221 WIS. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478, ERRED IN HOLDING THAT THE DECISION OF THIS COURT IN CONNECTICUT GENERAL LIFE INS. CO. v. JOHNSON, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436 REQUIRED THAT THE TAX BE INVALIDATED AS BEYOND THE TAXING JURISDICTION OF THE STATE OF WISCONSIN UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the instant cases the Wisconsin Supreme Court, while it adhered to the construction placed upon Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478, nevertheless held the law invalid as applied to foreign corporations. The holding was based upon the assumption that the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson,* (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436, left no alternative other than to declare that the law in question, as applied to foreign corporations, imposed a tax beyond the taxing jurisdiction of the state contrary to the Fourteenth Amendment to the United States Constitution.

That the Court adhered to its former construction of the law is perfectly clear. A few quotations from the majority opinion establishes that fact beyond question:

"This Court had the constitutionality of sec. 3, ch. 505, Laws of 1935, as amended before it in State ex. rel. Froedtert G. & M. Co., Inc., Tax Comm. of Wisconsin, 1936, 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 56, 104 A.L.R. 1478. That was an action for a declaratory judgment and was brought by a Wisconsin corporation. The Court held that the tax imposed upon the Wisconsin corporation pursuant to the provisions of sec. 3, ch. 505, as amended by Laws 1935, c. 552, was a valid tax. In that case the Court held that the language of the act 'for the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local)' imposed an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders." (289 N. W. p. 679)

"There was a motion for a rehearing in the Froedtert case and briefs amicus curiae were filed by counsel appearing on behalf of foreign corporations. While the application of the law to foreign corporations was not before the Court upon the pleadings in the case, the Court concluded to consider the validity of the act as applied to foreign corporations and held: [221 Wis. 245]. 'We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived, and the validity of the latter form of taxation is established. The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the

state. They are as readily collectible as is an income tax against a foreign corporation. Liability for payment of the tax is imposed upon the corporation. If such liability may be imposed, there is no difficulty about collecting it, and there is no more difficulty about imposing the liability than existed in the Travis Case [Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 S. Ct. 228, 64 L. Ed. 460], supra, about imposing upon the employer liability for the income tax on salaries of nonresidents earned within the state.'

"This decision of the Court is vigorously assailed. We are earnestly besought to reconsider the decision of the Froedtert case so far as it applies to foreign corporations. It is agreed on all sides that the tax in question is an excise tax and this Court so held in the Froedtert case. The Court in effect held that the tax was an excise tax 'for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in this state' and was therefore subject to the jurisdiction of the state as are incomes and inheritances. It is apparent that upon this basis the tax imposed by subsec. (1), sec. 1 of the act can not be imposed upon dividends declared by a foreign corporation because they are not declared within this state nor is the privilege one granted by this state. To meet this objection on the motion for rehearing the Court held that a dividend declared by a foreign corporation was taxable to the extent that it was allocable to business transacted or property situated in this state because the dividend involved the distribution of earnings made within the state and such earnings had a constructive situs within the state." (Pages 679-680)

"In the Froedtert case we rejected the contention that the tax was a tax on property (221 Wis. at page 235, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478) and rested the right of Wisconsin to tax the dividend in question on the ground that that part of the dividend taxed having been earned within the state, the trans-

action of declaring and receiving the dividend had a situs within the state although the transaction took place in another state. * * *." (Page 681)

J. C. Penney Co. v. Wisconsin Tax Commission, (1940) 233 Wis. (adv. sheets) 286, 289 N. W. 677.

That the court below rested its decision upon *Connecticut General Life Ins. Co. v. Johnson,* (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436, is equally clear as demonstrated by the following language in the opinion:

"This determination of the Supreme Court of the United States [*Connecticut General Life Ins. Co. v. Johnson,* (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Co. 436] clearly holds that the fact that a fund which became the subject of a transaction in the state of Connecticut was earned within the state of California and might have been taxed there, does not give the transaction in Connecticut a situs within the state of California for the purposes of taxation. In our view the California case is a stronger case for jurisdiction to tax by a state than is the present case because in that case nothing but insurance premiums paid in California were dealt with and in levying the tax upon the company which did the business in California the amount of the reinsurance premiums was deducted in cases where the reinsurance premium was paid to a company authorized to do business in California. In both cases the thing taxed is a transaction without the state made pursuant to a privilege or right granted by another state measured by the amount of a fund earned in the taxing state. Under the Connecticut General Life Ins. Co. case, there being no constructive situs within the state of Wisconsin for the taxation of the transaction of declaring and receiving dividends in the state of New York, there is no basis for an excise tax within the state of Wisconsin upon the

dividend in question. Certainly the payment of a reinsurance premium on business done in the state of California to a company authorized to do business in California is more closely connected to California business than is the declaration of a dividend in the state of New York although that part of the dividend taxed accrued from earnings made in Wisconsin. If there is no situs for taxation purposes in the one case there certainly is not in the other. We are obliged to hold that the transaction of declaring and receiving the dividend in question was not taxable in the state of Wisconsin.

"[2] Diligent and able counsel for the state have been unable to suggest any other basis upon which the tax involved in this case can be sustained than that suggested in the Froedtert case. We have given the matter thorough and careful consideration because of the importance of the question involved and the effect a ruling adverse to the defendant will have upon state finances. While there is much to be said for the proposition that a foreign corporation admitted to do business in Wisconsin should be subject to the same burdens and liabilities as is a similar Wisconsin corporation, we must in the determination of this question conform to the law as laid down by the Supreme Court of the United States. The question here involved is one of the incidence of taxation and not whether the state has jurisdiction of certain corporate activities by reason of a business situs of a corporation. No claim is made that the plaintiff has any such situs nor is there any evidence in the record upon which such a claim can be based.

"[3, 4] We are strongly urged to affirm the judgment in this case because the state treasury is dependent upon the maintenance of the right of the state to tax dividends of foreign corporations to the extent that such dividends are derived from earnings within the state. The matter of financial exigencies of the state, however, afford no justification for the ignoring

of a rule of law laid down by the United States Supreme Court. The state must find its revenues within the field within which its taxing power may be exerted as prescribed by the constitution and laws of the United States." (Pages 681-682)

J. C. Penney Company v. Tax Commission, (1940) 233 Wis. (adv. sheets) 286, 289 N. W. 677.

We are not, therefore, confronted with a situation where the Wisconsin Supreme Court has changed its construction of the law but rather with a situation where, on the basis of its former construction, it felt compelled to invalidate its application of the law to foreign corporations upon ~~the basis~~ by reason of a subsequent decision rendered by this Court construing the taxing powers of the states under the Fourteenth Amendment.

We respectfully submit that the Supreme Court of Wisconsin erred in supposing that its decision in the case below was required by the holding of this Court in *Connecticut General Life Ins. Co. v. Johnson,* (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436. In that case the question before the Court for decision was stated in its opinion as follows:

"Appellant is a Connecticut corporation, admitted to do an insurance business in California. In addition to its business conducted within that state it has entered into contracts with other insurance corporations likewise licensed to do business in California, reinsuring them against loss on policies of life insurance effected by them in California and issued to residents there. These reinsurance contracts were entered into in Connecticut where the premiums were paid and where the losses, if any, were payable. The question for decision is whether a tax laid by Cali-

fornia on the receipt by appellant in Connecticut of the reinsurance premiums during the years 1930 and 1931, infringes the due process clause of the Fourteenth Amendment."

Connecticut General Life Ins. Co. v. Johnson, (1938) 303 U. S. 77, 78, 82 L. ed. 673, 58 S. Ct. 436.

The Court's analysis of the problem presented is contained in the following language:

"Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. Connecticut General L. Ins. Co. v. Johnson, supra (3 Cal. (2d) 87, 43 P. (2d) 278); compare Morris & Co. v. Skandinavia Ins. Co. 279 U. S. 405, 408, 73 L. ed. 762, 765, 49 S. Ct. 360. Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No acts in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection."

Connecticut General Life Ins. Co. v. Johnson, (1938) 303 U. S. 77, 81, 82 L. ed. 673, 58 S. Ct. 436.

The conclusion reached was to the following effect:

"* * * All that appellant did in effecting the reinsurance was done without the state and for its trans-

action no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state."

Connecticut General Life Ins. Co. v. Johnson, (1938) 303 U. S. 77, 82, 82 L. ed. 673, 58 S. Ct. 436.

As we understand the foregoing opinion, the holding simply amounts to the proposition that the State of California cannot tax a reinsurance business carried on in the State of Connecticut, even though it involves reinsurance contracts covering the lives of people who had originally been insured in the State of California. Putting the same thing differently, it was held that while the State of California may tax the transaction of business in that State, it may not tax a business which is transacted in another state.

The case at bar is an entirely different case. As was pointed out in the dissent of Justice Fowler (who wrote the opinion of the Court in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478):

"* * * The object of the California tax was the reinsurance premium received and contracted for in the state of Connecticut. The receipt and the contract were in no way connected with, in no way incidental to any transaction of the insurance company in California, and were in no way connected with or incidental to any earnings of the company from business conducted in California. The object of the instant tax is the declaration of a dividend made in New York on earnings of the plaintiff corporation through business

transacted in the state of Wisconsin. The declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed. The reason for the invalidity of the California tax does not apply to the instant case. * * *."

J. C. Penney Company v. Tax Commission, (1940) 233 Wis. (adv. sheets) 286, 289 N. W. 677, 683.

Thus, as indicated by Justice Fowler, the tax in the instant case is laid upon the distribution of corporate earnings derived from Wisconsin sources, under the protection of Wisconsin law, and confessedly subject to taxation in the State of Wisconsin.

The tax law here involved does not assume to tax any transaction outside the state, such as the declaration and payment of a dividend independent of the taxable situs of the income so devolved. It assumes to lay a tax upon a devolution of income which, for taxable purposes, occurs within the state and the power to tax the devolution is derived from the same source as the power to tax the income itself, namely,—the power to tax Wisconsin earnings.

Thus, we conclude that the Wisconsin Supreme Court erred in holding that the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson,* (1938) 303 U. S. 77, L. ed. 673, 58 S. Ct. 436, required it to overrule its holding in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478 and to invalidate Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as applied to foreign corporations, such as is respondent.

Point D.

THE DECLARATION AND PAYMENT OF DIVIDENDS OUTSIDE OF THE STATE OF WISCONSIN BY A FOREIGN CORPORATION DOES NOT ITSELF CONSTITUTE AN EVENT TAXABLE BY WISCONSIN AND THE COURT BELOW PROPERLY SO HELD. WHERE THE INCOME DISTRIBUTED IS DERIVED FROM WISCONSIN EARNINGS, HOWEVER, AND THUS FORMS THE SUBJECT MATTER OF THE TRANSFER, THE STATE OF WISCONSIN ACQUIRES JURISDICTION TO TAX THE TRANSFER.

In the cases below the Wisconsin Supreme Court, in its analysis as to state jurisdiction, applied the following reasoning:

(1) The exercise by a foreign corporation without the state of the power to declare and pay a dividend is not in itself taxable by the State of Wisconsin, since

(a) The privilege to declare the dividend is not granted by the State of Wisconsin, and,

(b) The physical acts of declaring and paying the dividend do not occur within the territorial limits of Wisconsin.

(2) The fact that a dividend so declared and paid by a foreign corporation is derived from Wisconsin earnings does not empower the state to tax the transfer of such earnings effected by the declaration and payment of said dividend, since this Court had, in substance, so held in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436.

With the first of these propositions we do not disagree. It is perfectly evident that the State of Wisconsin may not, as an independent basis of taxation, tax the exercise of a privilege which it does not grant. Neither may it, as an independent basis of taxation, impose a tax upon a transaction which occurs without its territorial jurisdiction.

But the present case does not turn upon any such consideration. The law here involved does not assume to tax a privilege granted by the State. As stated by the Court in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission,* (1936) 221 Wis. 225, 230, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478, the tax is laid upon the exercise of a right. Foreign corporations derive the privilege of declaring and paying dividends from the states of their incorporation. But, as indicated in the opinion of the Wisconsin Court in the *Froedtert Case* (221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478), the State of Wisconsin may tax the exercise of rights. And, as we have heretofore pointed out, the right to impose a transfer tax does not depend upon the fact that the taxing power grants the privilege to make the transfer.

Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803;
Knowlton v. Moore, (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

So far as declaration and payment of the dividend in a state outside of Wisconsin is concerned, it may be said that while such a transaction is not an independent basis for the imposition of a tax by the State of Wisconsin, it is most certainly a taxable event if the subject matter of the transfer is taxable by the State of Wisconsin.

In *Estate of Bullen,* (1910) 143 Wis. 512, 128 N. W. 109, Mr. Bullen, by an instrument executed in the State of Illinois and pursuant to the laws of the State of Illinois, transferred intangible property in trust to trustees resident in Illinois. He reserved to himself control over the income of the trust during his life time and also the power to revoke the trust. He died, domiciled in the State of Wisconsin, without having exercised his power of revocation. Against the specific objection that the transfer was effectuated outside the State of Wisconsin pursuant to the laws of another state, the Wisconsin Supreme Court held that the intangibles forming the subject matter of the trust could be regarded as located at the domicile of the decedent for transfer tax purposes.

Upon appeal to this Court it was held, *Bullen v. Wisconsin,* (1916) 240 U. S. 625, 60 L. ed. 830, 36 S. Ct. 473, that the control retained by Mr. Bullen during his life time over the trust, and his power to revoke it, constituted important property rights. It was held that the non-exercise of the power of revocation during the life of Mr. Bullen resulted in the beneficiaries of the trust acquiring valuable rights by reason of Mr. Bullen's death. The court held that Mr. Bullen, having been domiciled in Wisconsin at the time of his death, the State could tax the transfer resulting from his death.

Substantially the same holding was made by this Court in *Graves v. Elliott,* (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913.

In each of these cases the instrument pursuant to which the property was transferred was executed without the State that was permitted to impose a transfer tax,

and in each case the instrument was executed pursuant to the law of the State of its execution.

For a similar case see *Curry v. McCanless,* (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900, where a testamentary disposition by a person domiciled in the State of Tennessee of intangibles forming the subject matter of a trust held by an Alabama trustee and administered in Alabama was held to be subject to a transfer tax in the State of Alabama. In that case the testamentary act of the decedent occurred in Tennessee and presumably was executed according to the laws of the State of Tennessee.

These cases turn upon the application of a rule which, as we have pointed out, is well established by the decisions of this Court, namely, that where property forming the subject of a transfer is taxable by the State, its transfer occurs within the jurisdiction of the State for tax purposes.

It is thus evident that the declaration and payment of a dividend by a foreign corporation in the State of New York, while it is not, as we have said, in itself a taxable event in the State of Wisconsin, may constitute such an event when the subject matter of the transfer is taxable by the State of Wisconsin.

As to the second proposition held by the Wisconsin Supreme Court, namely that the derivation of income from Wisconsin earnings did not endow the State with power to tax a transfer of such earnings,—we have already demonstrated that the case thought by the Court to require such a holding (*Connecticut General Life Ins. Co. v. Johnson,* (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436) is inapplicable. In fact such decisions of this Court as are ap-

plicable clearly demonstrate the error of the Court below in holding as it did.

The decisions of this Court, as we have heretofore pointed out, hold that a state in which a corporation or an individual acquires earnings may impose a tax upon those earnings or a tax measured by such earnings.

Underwood Typewriter Company v. Chamberlain, (1920) 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45;
Travis v. Yale & Towne Mfg. Co., (1920) 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228;
Shaffer v. Carter, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221;
United States Glue Company v. Oak Creek, (1918) 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499.

The fact that the earnings of a corporation which are derived from the State of Wisconsin may be represented by bank deposits in other states obviously does not deprive the State of Wisconsin of the right to tax such earnings and so far as we are advised no one has ever contended that it did.

For the same reason, the presence of Wisconsin earnings in out-of-state banks can not affect the right of the State to impose a transfer tax on such earnings. In either event the jurisdiction to tax arises by reason of the fact that the earnings have been derived from Wisconsin and not by reason of the fact that there is any tangible subject of taxation within the State at the time the tax is imposed.

We are unable to determine how it can possibly be said that the net income of a foreign corporation has a situs in the State of Wisconsin for the purpose of imposing a tax upon that income but does not have a situs in the State

for the purpose of imposing a tax based upon its transfer from the corporation to the stockholders of the corporation in the form of dividends. Certainly the decisions of this Court neither require nor justify any such distinction.

Quite to the contrary we have been unable to find any case in which the power of a state to tax the subject of a transfer is not held to justify the imposition of a tax upon the transfer, so far as jurisdictional aspects are concerned. The following cases indicate that power to tax the subject is the proper test.

Graves v. Elliott, (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913;
Curry v. McCanless, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900;
Rhode Island Hospital Trust Co. v. Doughton, (1926) 270 U. S. 69, 70 L. ed. 475, 46 S. Ct. 256;
Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803.

Looking beyond the mere form of things it is evident that the stockholders of a corporation earning money within the State of Wisconsin, under the protection of its laws, for the purpose of distributing that money among themselves, may lawfully be required to pay something for the protection given them by the State of Wisconsin.

Curry v. McCanless, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900;
Shaffer v. Carter, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221.

It certainly is not necessary, however, that the State of Wisconsin measure any tax exacted as payment for such

protection by the total net income of the corporation. The State can measure its exaction by that part of the net income which is distributed to its shareholders.

The fact that a tax is measured by the "amount of dividends declared" cannot be made the basis of a tenable constitutional objection to a taxing act imposing a tax so measured. The use of "amount of dividends declared" as the measure of a tax is not only proper, but just and equitable. Measuring of taxes by dividends paid is not new but is supported by precedent of long standing. Pennsylvania, New York and the Federal Government have, at one time or another, imposed taxes which were measured by the amount of dividends declared by corporations.

As early as 1814, and for years thereafter, Pennsylvania imposed upon corporations, taxes measured in part or in whole by the amount of dividends declared.

See Sec. 10, Chapter 3902, Laws of Pennsylvania, 1814;
Sec. 1, Act No. 232, Laws of Pennsylvania, 1840;
Sec. 33, Act No. 318, Laws of Pennsylvania, 1844;
Sec. 1, Act No. 523, Laws of Pennsylvania, 1859;
Sec. 21, Act No. 332, Laws of Pennsylvania, 1889.

The above acts were applied and taxes levied thereunder sustained in numerous cases decided by the Pennsylvania courts, constitutionality thereof having been assumed, as it was neither raised nor considered.

Commonwealth v. Cleveland, Painesville, and Ashtabula R. R. Co., (1857) 29 Pa. St. 370;
Leghigh Crane Iron Co. v. Commonwealth, (1867) 55 Pa. St. 448;

Phoenix Iron Co. v. Commonwealth, (1868) 59 Pa. St. 104;
Commonwealth v. Western Land & Improvement Co., (1893) 156 Pa. St. 455, 26 Atl. 1034.

New York also has enacted statutes imposing taxes on certain corporations which taxes were measured by the amount of dividends declared. See Sections 182 and 186, Article 9, Chapter 60, Consolidated Laws of New York. Here also the said acts were applied and taxes levied thereunder sustained, the constitutionality thereof apparently having been assumed, as it was neither raised nor considered.

People ex rel. Mercantile Safe Deposit Co. v. Sohmer, (1913) 158 App. Div. 110, 143 N. Y. S. 313;
People ex rel. Adams Elec. Light Co. v. Graves, et al., (1936) 272 N. Y. 77, 4 N. E. (2d) 941;
People ex rel. Central Zone Property Corporation v. Graves, et al., (1937) 250 App. Div. 175, 294 N. Y. S. 177;
In the Matter of Mercantile Properties v. State Tax Commission, (1938) 278 N. Y. 325, 16 N. E. (2d) 352.

Chapter 361, Laws of New York, 1881, imposed upon every corporation a tax measured by each 1% of dividends declared in excess of 6% on capital stock, or if the dividends declared were less than 6% the tax was at a specified rate upon the par value of the capital stock. Over numerous constitutional objections, the said act was sustained in *Home Insurance Co. v. New York,* (1890) 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593, as applied to domestic corporations and in *Horn Silver Mining Co. v. New York,*

(1892) 143 U. S. 305, 36 L. ed. 164, 12 S. Ct. 403, as applied to foreign corporations merely licensed to do business in the State of New York.

Under Section 122 of the Federal internal-revenue law, as amended by the Act of 1866 (13 Stat. at Large 284, 14 Stat. at Large 138) there was imposed a tax of five per cent on all interest payable and dividends declared by any railroad or canal company, and other types of specified companies, whenever payable, and under the said Act the companies were authorized to deduct the amount of the tax from the amount payable to the bondholder or stockholder. The said Act was applied without question as to its constitutionality, its constitutionality being assumed, in *Barnes v. The Railroad,* (1873) 17 Wall. (84 U. S.) 294, 21 L. ed. 544 and in *Bailey v. N. Y. C. & H. R. R. Co.,* (1875) 22 Wall. (89 U. S.) 604, 22 L. ed. 840. In *Railroad Co. v. Collector,* (1879) Otto (100 U. S.) 595, 25 L. ed. 647, the said Act was sustained over constitutional objections that the tax as applied to the amounts payable to citizens and residents of foreign countries was invalid.

For an even more recent Federal tax so measured, see: Act of Congress, Jan. 16, 1933, Chap. 90, Sec. 213(a) (48 Stats. at Large, pt. 1, page 206).

And so far as the presence of the corporate income within the State of Wisconsin is concerned, if the State could lay a tax upon the corporation measured by a percentage of its income distributed to stockholders, and payable at the time of distributing it, the State can certainly lay a tax upon the distribution of the income to the stockholders. In neither case is the income physically within the State. It is here for purposes of taxation only. And

jurisdiction that does not depend upon physical presence in the state, certainly is not lost by reason of physical absence from the state.

Curry v. McCanless, (1939) 307 U. S. 357, 83 L. ed. 1356, 59 S. Ct. 913;
First Bank Stock Corp. v. Minnesota, (1937) 301 U. S. 234, 81 L. ed. 1061, 57 S. Ct. 677.

Since the argument under this point of our briefs to some extent at least, involves a recapitulation of arguments already advanced we do not intend to belabor the court with a repetition of all such arguments. We merely direct the Court's attention, therefore, to those arguments advanced under Point B.

But one thing remains to be considered in this part of the argument. We contended in our petitions for certiorari that under the decisions of *Barnes v. The Railroads,* (1873) 17 Wall. (84 U. S.) 294, 21 L. ed. 544, and *Railroad Company v. Collector,* (1879) X Otto (100 U. S.) 595, 25 L. ed. 647, the tax here in question is, in substance, imposed upon the corporations required to pay it. Respondents will undoubtedly contend to the contrary as they did in the State Court. We do not relent from our position thus asserted. However, whatever may be the correct view upon that question is immaterial for the purpose of determining the constitutionality of the tax in question. The fact that the State of Wisconsin may not impose a tax upon the recipient of a dividend does not militate against the right of the State to impose a transfer tax upon a subject matter transferred to him and to require deduction of the amount of the tax from the subject of the transfer.

Greiner v. Lewellyn, (1922) 258 U. S. 384, 66 L. ed. 676, 42 S. Ct. 324;
Snyder v. Bettman, (1903) 190 U. S. 249, 27 L. ed. 1035, 23 S. Ct. 803.

We accordingly conclude that the State of Wisconsin had jurisdiction to impose the tax in question and that the decision of the Wisconsin Supreme Court to the contrary is erroneous and disregards the law as laid down by the decisions of this Court. The cases should be reversed.

Respectfully submitted,

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APPENDIX.

Section 3, Chapter 505, Laws of Wisconsin, 1935, Effective On Its Publication on September 26, 1935, and as Amended by Chapter 552, Laws of Wisconsin, 1935, Effective on Its Publication on October 8, 1935, Provides:

"Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the

state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipts of dividends from which a privilege dvidend tax has been deducted and withheld and the distribution thereof to its stockholders.

(7) For the purposes of ths section, dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividends or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury."

(*Note:* The same provisions are now contained, with some additions, in the present Wisconsin tax laws. See Section 71.60, Wis. Stats. 1939.

Chap. 309, Sec. 3, Laws of Wisconsin, 1937, extended its date of applicability to July 1, 1939.

Chap. 198, Sec. 1, Laws of Wisconsin, 1939, extended its date of applicability to July 1, 1941, and increased the rate of tax to 3%.)

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